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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

FEDERAL TRADE COMMISSION,
STATE OF ARIZONA,
STATE OF CALIFORNIA,
DISTRICT OF COLUMBIA,
STATE OF ILLINOIS,
STATE OF MARYLAND,
STATE OF NEVADA,
STATE OF NEW MEXICO,
STATE OF OREGON, and
STATE OF WYOMING,

Plaintiffs,

v.

THE KROGER COMPANY and
ALBERTSONS COMPANIES, INC.,

Defendants.

Case No.: 3:24-cv-00347-AN

**DECLARATION OF SUSAN A.
MUSSER IN SUPPORT OF BRIEF
REGARDING ADMISSIBILITY OF
DOCUMENTS AND TESTIMONY**

I, Susan A. Musser, declare as follows:

1. I am Chief Trial Counsel for the Federal Trade Commission, Bureau of Competition. I am over the age of 18 and counsel of record for Plaintiff Federal Trade Commission in the above-captioned action. I make this declaration based on personal

MUSSER DECLARATION ISO BRIEF RE ADMISSIBILITY

knowledge. I make this declaration in support of Plaintiffs' Brief Regarding Admissibility of Documents and Testimony.

2. Attached to this declaration as Exhibit A is a true and correct copy of the Transcript of Hearing in *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 30, 2008).

3. Attached to this declaration as Exhibit B is a true and correct copy of the Final Pretrial Hearing transcript in *In re Illumina, Inc.*, No. 9401 (F.T.C. Aug. 23, 2021).

4. Attached to this declaration as Exhibit C is a true and correct copy of an Order in *FTC v. Thomas Jefferson Univ.*, No. 2:20-cv-1113-GJP (E.D. Pa. Dec. 8, 2020).

5. Attached to this declaration as Exhibit D is a true and correct copy of the Transcript of Evidentiary Hearing in *FTC v. Wilhelm Wilhelmsen*, 1:18-cv-00414-TSC (D.D.C. May 29, 2018).

6. Attached to this declaration as Exhibit E is a true and correct copy of an Order in *FTC v. Thomas Jefferson Univ.*, No. 2:20-cv-1113-GJP (E.D. Pa. Sept. 10, 2020).

7. Attached to this declaration as Exhibit F is a true and correct copy of Joint Stipulation and Order Regarding Documents Admitted into Evidence, *FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325-EJD (N.D. Cal. Dec. 22, 2022).

8. Attached to this declaration as Exhibit G is a true and correct copy of the Transcript of Proceedings in *FTC v. Novant Health*, 5:24-CV-00028-KDB-SCR (W.D.N.C. April 24, 2024).

9. In *FTC v. Microsoft Corp.*, No. 23-cv-02880-JSC (N.D. Cal.), the district court opinion cites and relies on declarations and investigational hearing testimony that was not presented at the evidentiary hearing. *See* 681 F. Supp. 3d 1069, 1078 (N.D. Cal. July 10, 2023).

10. In *FTC v. IQVIA Holdings Inc.*, No. 1:23-cv-06188-ER (S.D.N.Y.), the FTC was permitted to cite in its Proposed Findings to investigational hearing testimony and other evidence not admitted at the preliminary injunction hearing.

11. In *FTC v. Novant Health*, 5:24-CV-00028-KDB-SCR (W.D.N.C.), the district court permitted both the FTC and Defendants to cite exhibits in post-hearing findings of fact, and subsequently admitted such exhibits, including documents without a sponsoring testifying witness.

12. Plaintiffs have included 23 investigational hearing and deposition transcripts on their exhibit list. 16 of these transcripts were examinations under oath of Defendants' own employees. For each of these examinations, Defendants' employees were represented by counsel who had an opportunity to ask questions on the record. For the remaining 7 transcripts, Defendants had an opportunity to depose each witness to ask about any topics or questions covered in the investigational hearing.

13. The FTC's/Complaint Counsel's final exhibit list in the administrative proceeding includes 3,384 exhibits.

14. Defendants'/Respondents' final exhibit list in the administrative proceeding includes 2,731 exhibits.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2024, in Washington, D.C.

/s/ Susan A. Musser

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